Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of TELEPHONE COMPANY- CABLE TELEVISION Cross -Ownership Rules, Sections 63.54-63.58 and Amendments of Parts 32, 36, 61, 64, and 69 of the Commission's Rules to Establish and Implement Regulatory Procedures for Video Dialtone Service	CC Docket No. 87-266 RM -8221

To the Commission:

JOINT REPLY COMMENTS REGARDING VIDEO DIALTONE

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TABLE OF CONTENTS

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JOINT REPLY COMMENTS REGARDING VIDEO DIALTONE

Pursuant to the Commission's Third Further Notice of Proposed Rulemaking in the above captioned matter, the Atlantic Cable Coalition, The Cable Television Association of Georgia, The Great Lakes Cable Coalition, The Minnesota Cable Television Association, The Oregon Cable Television Association, The Tennessee Cable Television Association, and The

Texas Cable TV Association ("Joint Commenters")[1] hereby submit these Reply Comments in response to the Commission's Third Further Notice concerning Video Dialtone.[2]

INTRODUCTION AND SUMMARY

In the Third Further Notice of Proposed Rulemaking, the Commission sought comment regarding capacity issues raised by the various video dialtone applications, relaxation of the rules prohibiting telephone company purchase of existing cable facilities, the legality and wisdom of preferential treatment for certain programmers on video dialtone systems, and the need for video dialtone specific pole attachment rules.[3] In their initial comments, the Joint Commenters demonstrated that analog channel sharing schemes where not legally permissible, and further would thwart the achievement of the Commission's public policy goals. In addition, Joint Commenters showed that preferential treatment of any programmer similarly would be illegal and against public policy. Finally, the Joint

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[1] The Atlantic Cable Coalition comprises the Cable Television Association of Maryland, Delaware, and the District of Columbia, the New Jersey Cable Television Association, the Pennsylvania Cable Television Association, the Virginia Cable Television Association, and the West Virginia Cable Television Association. The Great Lakes Cable Coalition comprises the Cable Television and Communications Association of Illinois, the Indiana Cable Television Association, the Michigan Cable Television Association, the Ohio Cable Television Association, and the Wisconsin Cable Television Association. The associations represented by these coalitions, as well as those individually listed, include more than 4700 cable systems serving 28 million subscribers. These coalitions and associations have participated in the various video dialtone 214 proceedings at the Commission.

[2] The Joint Commenters filed initial Comments in this proceeding. Joint Comments Regarding Video Dialtone (filed Dec. 16, 1994) ("Joint Comments").

[3] Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, FCC 94-269, ¶¶ 268-85 (released Nov. 7, 1994) ("Video Dialtone Order Recon"or "Third FNPRM")).

Commenters supported the Pole Attachment Comments of Continental Cablevision, Inc. *et al.*, noting that telco provision of video dialtone had already brought about an increase in anticompetitive behavior by LECs in the form of unlawful pole attachment rates and conditions.

Despite the wealth of comments, no other party's comments presented arguments undermining or rebutting the Joint Commenters' points. Indeed, the comments of many parties raise additional problems with channel sharing and preferential access, and the comments of other parties unwittingly support the Joint Commenters' assertions. For instance, the comments of programmers demonstrated that channel sharing would impermissibly restrain the program producers' control over the distribution of their product. Similarly, the comments of broadcasters raised serious issues regarding channel positioning, retransmission consent, network nonduplication, and syndicated exclusivity. The comments of the telephone industry pointed out both the danger to the public interest posed by the LECs' desire to control their systems and the inconsistency of channel sharing schemes with video dialtone's common carrier model. It has also been made apparent that analog technology, which the LECs are unwilling or unable to expand, is incapable of satisfying the Commission's capacity requirements in a nondiscriminatory manner, and that analog and digital service are not interchangeable, "like" services. Finally, the comments of nearly all parties, except those that seek to benefit from such arrangements, agree that preferential treatment of any programmer would violate the Communications Act, the Cable Act, the First Amendment, and public policy. Accordingly, the Commission must reject analog channel sharing proposals, require

that telcos use technologies that can provide nondiscriminatory access to multiple programmers, and forbid preferential or discriminatory treatment of any programmer on a video dialtone system.

I. CAPACITY ISSUES

A. Channel Sharing Schemes Are Illegal And Against Public Policy

In the Joint Commenters' initial Comments in this proceeding, they demonstrated that any "analog channel sharing" scheme would violate the common carrier requirements of the Communications Act and would be against public policy.[4] No other party's comments presented arguments that undermine or rebut the Joint Commenters' showings.[5] Indeed, the comments of many other parties present additional reasons why the Commission can neither mandate nor allow channel sharing schemes on video dialtone systems. For instance, the comments of programmers, such as Home Box Office ("HBO") and Viacom, point out that channel sharing schemes present a serious threat to the proprietary

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[4] Joint Comments at 8-19.

[5] The argument raised in comments by broadcast and PEG programmers that Section 201(b) allows for different treatment of certain classes is unavailing. See, e.g., Comments of the Association of America's Public Television Stations at 3-5 ("AAPTS Comments"); Comments of the National Association of Broadcasters at 6 ("NAB Comments"). Section 201(b) only allows such classifications if they are not unreasonable. 47 U.S.C. § 201(b). As discussed infra, the broadcast and PEG commenters presented no evidence or information demonstrating that it is reasonable, or even necessary, for special treatment to be accorded them. Certainly, therefore, no evidence has been presented indicating that the special treatment of certain programmers over others by placement in a group of shared channels would not be unreasonably discriminatory

rights of program producers.[6] Both Viacom and HBO emphasize the critical importance to program producers of maintaining ultimate control over who distributes their product.[7] The need to assure that program producers retain such control dictates that channel sharing not be authorized, for the "shared channels" would not be truly available to all programmer/packagers on a common carrier basis because of the program producers' ability to pick-and-choose who will and will not be allowed to distribute their product.

The Comments of the National Association of Broadcasters ("NAB") also illustrate the problems with channel sharing proposals. In its Comments, NAB asserts that broadcasters must receive retransmission consent fees from all users, syndicated exclusivity, network nonduplication, and carriage on channel numbers corresponding to over-the-air channels.[8] Indeed, NAB asserts that if it is not technologically feasible to provide broadcasters with their over-the-air channel numbers, their signals should be made available to video dialtone subscribers as part of the initial group of signals available to subscribers when they turn on their set.[9] Clearly, these are serious and substantial issues that have not otherwise been addressed, but that cannot be avoided if channel sharing were to be allowed.

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[6] Comments of Viacom International, Inc. at 9 ("Viacom Comments"); Comments of Home Box Office In the Third Notice Of Proposed Rulemaking at 9 ("HBO Comments").

[7] Viacom Comments at 9; HBO Comments at 9.

[8] NAB Comments at 3-4.

[9] NAB Comments at 4.

The comments of the telephone industry support the Joint Commenters' point that channel sharing schemes would violate common carriage principles. In the Joint Comments, the Joint Commenters noted that channel sharing schemes fit within the Commission's rationale for rejecting "Anchor Programmer" proposals.[10] Particularly, the Joint Commenters demonstrated that channel sharing, like Anchor Programmer proposals, are premised on the assumption that only analog capacity will make video dialtone a marketable alternative to cable service in the short term, and therefore like the rejected Anchor Programmer proposals, channel sharing schemes would be inconsistent with the common carrier model for video dialtone.[11]

The comments filed by the LECs generally assert that the Commission must allow LECs to create whatever channel sharing scheme they wish so that video dialtone will be competitive to cable.[12] The LECs' comments, however, merely emphasize the Joint Commenters' point that, like the rejected Anchor Programmer proposals, "these requests [are] premised on the assumption that only analog capacity allows a viable alternative to cable

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[10] Joint Comments at 15-16.

[11] Joint Comments at 15-16 (citing Video Dialtone Order Recon, ¶ 35).

[12] See, e.g., Comments of BellSouth Telecommunications, Inc. at 4 ("BellSouth Comments"); Comments of GTE at 5 ("GTE Comments"); Comments of U S West Communications, Inc. at 6 ("U S West Comments"). The schemes proposed by the few LECs that did not advocate total flexibility in the telco, see, e.g., Comments of the Southern New England Telephone Company at 5-8 ("SNET Comments"), are impermissible for the reasons described in the Joint Comments — namely, they create a cable system, not a video dialtone system; they violate common carrier principles; and they violate public policy. Joint Comments at 8-19.

service in the short-term. To grant these requests would thus be inconsistent with the common carrier model for video dialtone. . . ."[13]

Ultimately, channel sharing schemes, like Anchor Programmer proposals, illustrate the telcos' appetite to control their "video dialtone systems" in the nature and manner of cable systems. Claiming that a telco is not a cable operator only because the telco's equipment theoretically is not "transmitting" the programming directly to subscribers is a narrow distinction, indeed, particularly when the telco has determined, like a cable operator would, where on its system certain programmers will be placed, and who those programmers will be.[14] From their assertions in their comments that they must have total flexibility and control over their "video dialtone systems," it is clear that the LECs wish to, and indeed intend to operate their systems more like traditional cable systems than the common carrier network authorized by the Commission's video dialtone orders. Granting the telcos the ability to place a single programmer/packager in control of a large block of analog capacity under the guise of "channel sharing" will simply allow the telcos to create an "Anchor Programmer" under a different name. The result, however, will be the same; it will irreconcilably undermine the common carrier model for video dialtone.

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[13] Video Dialtone Order Recon, ¶ 35; Joint Comments at 15-16.

[14] Given that many LECs insist on referring to their video office equipment as "Headend Equipment," which the Commission in its first reconsideration order expressly determined was indicative of a cable system, the falsity of that distinction should now be clear.

B. Channel Sharing Schemes Demonstrate That Analog Video Dialtone Technology Will Not Satisfy The Commission's Capacity Requirements

The proposal of channel sharing schemes demonstrates that those systems needing such a scheme in order to accommodate multiple programmers do not satisfy the Commission's capacity requirements.[15] Accordingly, if LECs will not commit to expanding analog capacity, then they must use a technology that will provide sufficient capacity to serve multiple programmers on a *nondiscriminatory* basis. The Commission must recognize that the public interest will not be served by forsaking the common carrier principles underlying video dialtone through channel sharing proposals, which raise serious issues regarding discrimination, LEC control over programming, and LEC incentive for anticompetitive conduct. The Commission has stated that it is not neutral toward technologies that cannot satisfy its capacity requirements.[16] It must reach the logical conclusion, therefore, that since the LECs are unwilling or unable to expand analog capacity, and since analog and digital service are not interchangeable, "like" services,[17] analog video dialtone service is not capable of satisfying the Commission's requirements, and indeed, is on its way to becoming a bottleneck, thwarting the Commission's public interest goals.

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[15] Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking, 7 FCC Rcd 5781, 5797, ¶ 29 (1992) ("Video Dialtone Order"), appeal pending sub. nom. Mankato Citizens Tel. Co. v. FCC, No. 92-1404 (D.C. Cir. Sept. 9, 1992); Video Dialtone Order Recon, ¶¶ 30-39.

[16] Video Dialtone Order Recon, ¶ 34.

[17] Bell Atlantic also recognized that analog and digital are not "like" services. Bell Atlantic Comments at 11, n.19, Exhibit A at 4.

II. THE COMMUNICATIONS ACT AND PUBLIC POLICY MANDATE THAT PREFERENTIAL TREATMENT SCHEMES NOT BE IMPOSED OR ALLOWED

In the Joint Comments, the Joint Commenters demonstrated that preferential treatment proposals, regarding which the Commission sought comment, would violate the Cable Act, the Communications Act, and the First Amendment, and moreover, were contrary to public policy.[18] Other commenting parties, except those special interests that would benefit from such preferential treatment proposals, similarly asserted that the Commission lacks the legal authority to mandate preferential treatment of certain programmers.[19] Further, parties generally recognized that preferential treatment of certain programmers would introduce unreasonable distortions in the market that would harm the public interest.[20] Indeed, the position advocated by Southwestern Bell demonstrates the substantial threat to the public interest posed by preferential treatment proposals. Southwestern Bell asserted in its comments that if more parties were eligible for special treatment than available capacity could

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[18] Joint Comments at 21-27.

[19] Comments of Ameritech on Third Further Notice of Proposed Rulemaking at 8 ("Making an exception for this category of programmers could undermine the Commission's common carriage policy with respect to other aspects of the video dialtone platform, including, for example, the number of channels allocated to a single programmer-customer and rejection of the 'anchor programmer' concept"); AT&T Comments at 8-9; HBO Comments at 11-14.

[20] AT&T Comments at 8-9; HBO Comments at 12-13. The LECs again exposed their desire to exercise total control over the programming content and make-up of their systems by insisting that while the Commission cannot mandate preferential treatment, LECs should have absolute, arbitrary control over whether to accord preferential treatment to favored programmers. See, e.g., Comments of the Pacific Telesis Group, Pacific Bell and Nevada Bell at 8; GTE Comments at 16. As explained in the Joint Comments, beyond the legal impediments, allowing LECs to favor certain programmers through preferential treatment or channel sharing arrangements would create a significant incentive and ability for LECs to anticompetitively favor programmers with whom they were affiliated or had some other form of arrangement.

serve, the LEC should be permitted to determine which programming would be carried based on the LEC's subjective opinion of the market for the programming.[21] Clearly, such unfettered discretion in the LEC would wholly undermine the common carrier nature of video dialtone, thus posing a substantial threat to the public interest.

No party advocating preferential treatment for certain programmers presented persuasive arguments. For instance, broadcasters and PEG programmers, who look to benefit under existing preferential treatment proposals, generally asserted that preferential treatment could be accorded consistent with the Communications Act because of the proviso in Section 201(b) that allows for discrimination between classifications found just and reasonable by the Commission.[22] What those commenters overlook is that, as explained in the Joint Comments, it would be unreasonable to distinguish between local broadcasters or PEG programmers and traditional cable-transmitted programmers, such as C-Span and CNN. As the Joint Comments pointed out, there is no evidence in the record before the Commission indicating that discrimination in favor of the programmers named in preferential treatment proposals would be reasonable, needed, or in the public interest.[23] Further, in an analog environment, every

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[21] Southwestern Bell Corporation's Initial Comments On Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking at 18 ("Southwestern Bell Comments").

[22] AAPTS Comments at 3-5; NAB Comments at 6; Comments of Center for Media Education, Consumer Federation of America, Media Access Project, and People for the American Way at 12-14; 47 U.S.C. § 201(b).

[23] Joint Comments at 25-26. Further, as the Joint Comments, and the comments of other parties, pointed out, under the Supreme Court's analysis in Turner Broadcasting Sys. v. FCC, 114 S. Ct. 2445, 2471-72 (1994), the complete lack of evidence regarding the need for special treatment of any programmer would make any rule mandating such treatment highly suspect

channel allotted to PEG programming or local broadcasters on preferential grounds would be one less channel available to other programmers. If the Commission allows LECs to provide analog service with limited capacity, the discriminatory allotment of scarce facilities to local broadcasters or PEG programmers would be even more unreasonable. Ultimately, a choice by a LEC, or the Commission, to favor a local broadcaster over a traditional cable transmitted station, such as C-span or CNN, would be arbitrary and capricious, and an unreasonable discrimination based on mode of transport and untenable assertions regarding the importance of the programming.[24]

CONCLUSION

The Commission should adopt an Order stating that analog channel sharing and similar proposals are contrary to the Communications Act, the Cable Act, the Video Dialtone Order, and the public interest, and forbidding video dialtone providers from engaging in such schemes. Further, the Commission should state in its Order that preferential treatment of

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under the First Amendment. Joint Comments at 25-26; see also U S West Comments at 24-28. U S West argues that there is no evidence supporting preferential access or rates for broadcasters and PEG programmers, but, of course, U S West asserts that it should have the power to engage in situational discrimination based on its own "business initiatives." While it is correct to point out the lack of support for preferential treatment, U S West's attempt to retain power over the composition of its system is impermissible for the reasons discussed previously.

[24] Indeed, it would be highly unreasonable to assert that a channel showing syndicated re-runs of 30 year old situation comedies better serves the public interest than C-Span's coverage of Congress or CNN's acclaimed coverage of national and international news. Further, there is no basis for asserting that the noncommercial news programs of PBS, such as the MacNeil/Lehrer NewsHour, are more deserving of preferential treatment than the noncommercial programming of C-Span.

certain programmers, whether mandated or voluntary, would similarly violate the Communications Act, the Cable Act, the Video Dialtone Order, the First Amendment, and the public interest. The Commission should, therefore, refuse to adopt such mandated preferential treatment proposals, and further, it should forbid video dialtone providers from implementing such proposals voluntarily.

Respectfully submitted,

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January 17, 1995

CERTIFICATE OF SERVICE

I, Scott Thompson do hereby certify that on this 17th day of January 1995, I have caused a copy of the foregoing to be served via first-class United States Mail, postage pre-paid, upon the persons listed on the attached service list.

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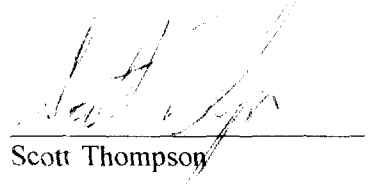

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